

PATENT  
Customer No. 22,852  
Attorney Docket No. 07738.0147-00000

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:	)	
	)	
Grant E. DUBOIS et al.	)	Group Art Unit: 1761
	)	
Application No.: 09/838,809	)	Examiner: Carolyn A. PADEN
	)	
Filed: April 20, 2001	)	
	)	
For: NON CALORIC FROZEN	)	Confirmation No.: 3526
CARBONATED BEVERAGE	)	

**VIA EFS-Web**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Sir:

**REQUEST TO WITHDRAW THE  
ERRONEOUS HOLDING OF ABANDONMENT**

The Office mailed a Notice of Abandonment in the above-referenced application on January 5, 2009, alleging that this application became abandoned because of Appellant's "failure to timely file a proper reply to the Office letter mailed on 03 June 2008." Based on the facts stated below, Appellant submits that this holding of abandonment is erroneous, respectfully requests that it be withdrawn, and requests continuation of the examination and appellate proceedings of the application.

According to the "Transaction History" and "Image File Wrapper" sections of Private PAIR (see Appendices A and B), the Office did not mail any letter or other communication on June 3, 2008. Instead, on December 3, 2007, the Office mailed a Final Office Action and, on June 3, 2008, Appellant timely filed a Notice of Appeal along

with a Pre-Appeal Brief Request for Review, in addition to a Petition for an Extension of Time for three (3) months (and payment of \$1560.00 in fees), within the requisite six-month window for responding to a Final Office Action. See 35 U.S.C. § 133; 37 C.F.R. § 1.116(a); 37 C.F.R. § 1.191(a). The Transaction History section of Private PAIR indicates that the Extension of Time was “granted.” See Appendix A.

In the Notice of Panel Decision from Pre-Appeal Brief Review mailed June 10, 2008, the Office required Appellant to “proceed to the Board of Patent Appeals and Interferences” and noted the following:

Applicant is required to submit an appeal brief in accordance with 37 CFR 41.37. The time period for filing an appeal brief will be reset to be one month from mailing this decision, or the balance of the two-month time period running from the receipt of the notice of appeal, whichever is greater. Further, the time period for filing of the appeal brief is extendible under 37 CFR 1.136 based upon the mail date of this decision or the receipt date of the notice of appeal, as applicable.

As the Notice of Panel Decision was mailed on June 10, 2008, and the Notice of Appeal was received by the Office on June 3, 2008, the time period for filing an appeal brief was two months from June 3, or August 3 (greater than one month from June 10, or July 10). Five one-month extensions of time are then available, as stated in the Notice of Panel Decision and as provided by 37 C.F.R. § 1.136(a). Accordingly, an Appeal Brief could be deemed timely filed as much as seven months after the filing date of the Notice of Appeal—in this case, by January 3, 2009. However, January 3, 2009, was a Saturday. By operation of 35 U.S.C. § 21(b), an Appeal Brief would then be deemed timely filed on Monday, January 5, 2009.

On January 5, 2009, Appellant timely filed an Appeal Brief along with a Petition for an Extension of Time for five (5) months, and total payment of \$2890.00 in fees. See Appendix B (listing “Appeal Brief filed” and “Extension of Time” on January 5, 2009). On that day, the Office also mailed the Notice of Abandonment. See *id.*<sup>1</sup> Recognizing the Office’s mistake, Appellant noted in the Petition for Extension of Time that “the PAIR IFW system already displays a Notice of Abandonment, which was issued in error.” The Office has yet to consider Appellant’s Appeal Brief.

Accordingly, because Appellant’s Appeal Brief was timely filed due to the five-month Petition for Extension of Time and by operation of 35 U.S.C. § 21(b), that Appeal Brief should be entered, the erroneous holding of abandonment should be withdrawn, and the appellate proceedings of the application should proceed. If the Office disagrees with Appellant’s presentation of the facts of this application as presented herein or the application of the relevant law, Appellant respectfully requests that the Office contact the undersigned representative at 404-653-6553 to discuss an appropriate resolution.

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<sup>1</sup> In fact, the Transaction History section of Private PAIR incorrectly lists “Abandonment for Failure to Respond to Office Action” on January 2, 2009, which is one day before the seven-month deadline of January 3, 2009, even without the benefit of 35 U.S.C. § 21(b). See Appendix A.

Appellant has filed this paper as a request and not as a formal petition.

However, should the Office determine that a petition is necessary to withdraw the erroneous holding of abandonment, Appellant requests that this paper be treated as a petition and the Office is authorized to charge any fees, whether for a request or a petition, to Deposit Account No. 06-0916, including any necessary extensions of time.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.



Dated: June 9, 2009

By: \_\_\_\_\_  
Alexis N. Fairweather  
Reg. No. 63,686

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For: NON CALORIC FROZEN	)	
CARBONATED BEVERAGE	)	

**APPENDIX A**

"Transaction History" from Private PAIR

09/838,809

Non caloric frozen carbonated beverage

06-09-2009::12:36:55

**Transaction History**

Date	Transaction Description
01-05-2009	Mail Abandonment for Failure to Respond to Office Action
01-02-2009	Abandonment for Failure to Respond to Office Action
06-11-2008	Mail Appeals conf. Proceed to BPAI
06-10-2008	Pre-Appeals Conference Decision - Proceed to BPAI
06-03-2008	Request for Pre-Appeal Conference Filed
06-03-2008	Notice of Appeal Filed
06-03-2008	Request for Extension of Time - Granted
12-03-2007	Mail Final Rejection (PTOL - 326)
12-01-2007	Final Rejection
11-01-2007	Date Forwarded to Examiner
11-01-2007	Date Forwarded to Examiner
10-30-2007	Request for Continued Examination (RCE)
11-01-2007	DISPOSAL FOR A RCE/CPA/129 (express abandonment if CPA)
10-30-2007	Request for Extension of Time - Granted
10-31-2007	Workflow - Request for RCE - Begin
10-04-2007	Case Docketed to Examiner in GAU
07-03-2007	Mail Final Rejection (PTOL - 326)
06-28-2007	Final Rejection
05-23-2007	Date Forwarded to Examiner
05-02-2007	Response after Non-Final Action
05-02-2007	Request for Extension of Time - Granted
11-20-2006	Mail Non-Final Rejection
11-17-2006	Non-Final Rejection
07-30-2001	Information Disclosure Statement considered
09-22-2006	Workflow - Request for RCE - Begin
09-25-2006	Date Forwarded to Examiner
09-25-2006	Date Forwarded to Examiner
09-22-2006	Request for Continued Examination (RCE)
09-25-2006	DISPOSAL FOR A RCE/CPA/129 (express abandonment if CPA)
09-22-2006	Request for Extension of Time - Granted
07-30-2001	Information Disclosure Statement (IDS) Filed
07-30-2001	Information Disclosure Statement (IDS) Filed
10-10-2003	Reference capture on IDS
03-22-2006	Mail Final Rejection (PTOL - 326)
03-16-2006	Final Rejection
02-14-2006	Date Forwarded to Examiner
02-03-2006	Response after Non-Final Action
02-03-2006	Request for Extension of Time - Granted
08-03-2005	Mail Non-Final Rejection
08-02-2005	Non-Final Rejection
06-28-2005	Date Forwarded to Examiner
06-23-2005	Response after Non-Final Action
03-24-2005	Mail Non-Final Rejection
03-10-2005	Non-Final Rejection
03-05-2005	Date Forwarded to Examiner

03-05-2005	Date Forwarded to Examiner
02-22-2005	Request for Continued Examination (RCE)
03-05-2005	DISPOSAL FOR A RCE/CPA/129 (express abandonment if CPA)
02-22-2005	Information Disclosure Statement (IDS) Filed
02-22-2005	Information Disclosure Statement (IDS) Filed
02-22-2005	Request for Extension of Time - Granted
02-22-2005	Workflow - Request for RCE - Begin
02-03-2005	Examiner Interview Summary Record (PTOL - 413)
08-19-2004	Mail Final Rejection (PTOL - 326)
08-18-2004	Final Rejection
08-07-2004	IFW TSS Processing by Tech Center Complete
08-07-2004	Date Forwarded to Examiner
07-19-2004	Response after Non-Final Action
07-19-2004	Affidavit(s) (Rule 131 or 132) or Exhibit(s) Received
07-19-2004	Request for Extension of Time - Granted
11-28-2001	Reference capture on IDS
07-19-2004	Workflow incoming amendment IFW
05-26-2004	Mail Examiner Interview Summary (PTOL - 413)
05-25-2004	Examiner Interview Summary Record (PTOL - 413)
03-05-2004	Mail Non-Final Rejection
03-02-2004	Non-Final Rejection
02-24-2004	Date Forwarded to Examiner
02-19-2004	Amendment after Final Rejection
02-19-2004	Request for Extension of Time - Granted
10-10-2003	Information Disclosure Statement (IDS) Filed
10-10-2003	Information Disclosure Statement (IDS) Filed
10-10-2003	Request for Foreign Priority (Priority Papers May Be Included)
11-05-2003	Mail Final Rejection (PTOL - 326)
10-30-2003	Final Rejection
10-12-2003	Date Forwarded to Examiner
09-25-2003	Response after Non-Final Action
09-25-2003	Request for Extension of Time - Granted
04-03-2003	Mail Miscellaneous Communication to Applicant
04-02-2003	Miscellaneous Communication to Applicant - No Action Count
03-11-2003	Information Disclosure Statement (IDS) Filed
03-11-2003	Information Disclosure Statement (IDS) Filed
03-20-2003	Mail Non-Final Rejection
03-17-2003	Non-Final Rejection
01-10-2003	Case Docketed to Examiner in GAU
11-25-2002	Information Disclosure Statement (IDS) Filed
11-25-2002	Information Disclosure Statement (IDS) Filed
03-21-2002	Preliminary Amendment
02-19-2002	Preliminary Amendment
11-28-2001	Information Disclosure Statement (IDS) Filed
11-28-2001	Information Disclosure Statement (IDS) Filed
10-25-2001	Case Docketed to Examiner in GAU
09-28-2001	Preliminary Amendment
10-04-2001	Application Dispatched from OIPE

10-03-2001	Application Is Now Complete
10-01-2001	Correspondence Address Change
06-18-2001	Notice Mailed--Application Incomplete--Filing Date Assigned
06-18-2001	Correspondence Address Change
05-04-2001	IFW Scan & PACR Auto Security Review
04-20-2001	Initial Exam Team nn

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**APPENDIX B**

"Image File Wrapper" from Private PAIR

09/838,809 Non caloric frozen carbonated beverage

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**This application is officially maintained in electronic form. To View: Click the desired Document Description. To Download and Print: Check the desired document(s) and click PDF.**

### Bibliographic Data

Mail Room Date	Document Code	Document Description	Document Category	Page Count
01-05-2009	ABN	<b>Abandonment</b>	<b>PROSECUTION</b>	<b>2</b>
01-05-2009	AP.B	Appeal Brief Filed	PROSECUTION	54
01-05-2009	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	2
01-05-2009	N417	EFS Acknowledgment Receipt	PROSECUTION	2
01-05-2009	XT/	Extension of Time	PROSECUTION	1
06-11-2008	AP.PRE.DEC	Pre-Brief Appeal Conference decision	PROSECUTION	2
06-03-2008	AP.PRE.REQ	Pre-Brief Conference request	PROSECUTION	6
06-03-2008	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	2
06-03-2008	N417	EFS Acknowledgment Receipt	PROSECUTION	2
06-03-2008	N/AP	Notice of Appeal Filed	PROSECUTION	1
06-03-2008	XT/	Extension of Time	PROSECUTION	1
12-03-2007	CTFR	Final Rejection	PROSECUTION	13
10-31-2007	RCEX	Request for Continued Examination (RCE)	PROSECUTION	1
10-31-2007	XT/	Extension of Time	PROSECUTION	1
10-31-2007	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	2
10-31-2007	N417	EFS Acknowledgment Receipt	PROSECUTION	2
10-31-2007	AMSB	Amendment Submitted/Entered with Filing of CPA/RCE	PROSECUTION	1
10-31-2007	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	4
07-03-2007	CTFR	Final Rejection	PROSECUTION	6
05-21-2007	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	1
05-21-2007	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	3
05-21-2007	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	2
05-21-2007	N417	EFS Acknowledgment Receipt	PROSECUTION	2
05-21-2007	XT/	Extension of Time	PROSECUTION	1
11-20-2006	CTNF	Non-Final Rejection	PROSECUTION	11
09-22-2006	RCEX	Request for Continued Examination (RCE)	PROSECUTION	1
09-22-2006	XT/	Extension of Time	PROSECUTION	1
09-22-2006	AMSB	Amendment Submitted/Entered with Filing of CPA/RCE	PROSECUTION	1
09-22-2006	CLM	Claims	PROSECUTION	18
09-22-2006	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	6
09-22-2006	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	2
09-22-2006	N417	EFS Acknowledgment Receipt	PROSECUTION	2
09-22-2006	LET.	Miscellaneous Incoming Letter	PROSECUTION	1
09-22-2006	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	1
03-22-2006	CTFR	Final Rejection	PROSECUTION	7
02-03-2006	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	1
02-03-2006	CLM	Claims	PROSECUTION	12
02-03-2006	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	5
02-03-2006	XT/	Extension of Time	PROSECUTION	1
02-03-2006	LET.	Miscellaneous Incoming Letter	PROSECUTION	2
02-03-2006	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	1

08-23-2005	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	17
08-23-2005	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	11
08-23-2005	CTFR	Final Rejection	PROSECUTION	11
08-03-2005	CTNF	Non-Final Rejection	PROSECUTION	8
08-03-2005	SRFW	Search information including classification, databases and other search related notes	PROSECUTION	1
08-03-2005	BIB	Bibliographic Data Sheet	PROSECUTION	1
06-23-2005	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	1
06-23-2005	CLM	Claims	PROSECUTION	10
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06-23-2005	FWCLM	Index of Claims	PROSECUTION	1
03-24-2005	CTNF	Non-Final Rejection	PROSECUTION	14
03-24-2005	892	List of references cited by examiner	PRIOR ART	1
03-24-2005	BIB	Bibliographic Data Sheet	PROSECUTION	1
02-22-2005	RCEX	Request for Continued Examination (RCE)	PROSECUTION	1
02-22-2005	AMSB	Amendment Submitted/Entered with Filing of CPA/RCE	PROSECUTION	1
02-22-2005	SPEC	Specification	PROSECUTION	1
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02-22-2005	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	14
02-22-2005	IDS	Information Disclosure Statement (IDS) Filed (SB/08)	PROSECUTION	2
02-22-2005	XT/	Extension of Time	PROSECUTION	1
02-22-2005	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	1
02-03-2005	EXIN	Examiner Interview Summary Record (PTOL - 413)	PROSECUTION	2
08-19-2004	CTFR	Final Rejection	PROSECUTION	11
08-19-2004	BIB	Bibliographic Data Sheet	PROSECUTION	1
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07-19-2004	CLM	Claims	PROSECUTION	10
07-19-2004	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	4
07-19-2004	AF/D	Rule 130, 131 or 132 Affidavits	PROSECUTION	3
07-19-2004	XT/	Extension of Time	PROSECUTION	1
07-19-2004	WFEE	Fee Worksheet (PTO-875)	PROSECUTION	1
07-19-2004	FWCLM	Index of Claims	PROSECUTION	1
05-26-2004	EXIN	Examiner Interview Summary Record (PTOL - 413)	PROSECUTION	3
03-05-2004	CTNF	Non-Final Rejection	PROSECUTION	9
03-05-2004	1449	List of References cited by applicant and considered by examiner	PRIOR ART	2
03-05-2004	892	List of references cited by examiner	PRIOR ART	1
02-26-2004	SRNT	Examiner's search strategy and results	PROSECUTION	1
02-19-2004	A.NE	Amendment After Final	PROSECUTION	1
02-19-2004	SPEC	Specification	PROSECUTION	3
02-19-2004	CLM	Claims	PROSECUTION	13
02-19-2004	REM	Applicant Arguments/Remarks Made in an Amendment	PROSECUTION	3
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10-10-2003	FOR	Foreign Reference	PRIOR ART	4
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10-10-2003	FOR	Foreign Reference	PRIOR ART	5
10-10-2003	FOR	Foreign Reference	PRIOR ART	7
10-10-2003	FOR	Foreign Reference	PRIOR ART	17
10-10-2003	FOR	Foreign Reference	PRIOR ART	27
10-10-2003	FOR	Foreign Reference	PRIOR ART	13
10-10-2003	FOR	Foreign Reference	PRIOR ART	5
10-10-2003	FOR	Foreign Reference	PRIOR ART	40
10-10-2003	FOR	Foreign Reference	PRIOR ART	22
10-10-2003	FOR	Foreign Reference	PRIOR ART	8
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10-10-2003	FOR	Foreign Reference	PRIOR ART	20
09-25-2003	LET.	Miscellaneous Incoming Letter	PROSECUTION	2
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03-20-2003	892	List of references cited by examiner	PRIOR ART	2
03-20-2003	1449	List of References cited by applicant and considered by examiner	PRIOR ART	3
03-13-2003	SRNT	Examiner's search strategy and results	PROSECUTION	2
03-11-2003	IDS	Information Disclosure Statement (IDS) Filed (SB/08)	PROSECUTION	2
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03-11-2003	FOR	Foreign Reference	PRIOR ART	26
11-25-2002	LET.	Miscellaneous Incoming Letter	PROSECUTION	1
11-25-2002	IDS	Information Disclosure Statement (IDS) Filed (SB/08)	PROSECUTION	2
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11-25-2002	FOR	Foreign Reference	PRIOR ART	118
11-25-2002	FOR	Foreign Reference	PRIOR ART	58
03-21-2002	A...	Amendment/Req. Reconsideration-After Non-Final Reject	PROSECUTION	1
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11-28-2001	FOR	Foreign Reference	PRIOR ART	6

11-28-2001	FOR	Foreign Reference	PRIOR ART	8
11-28-2001	FOR	Foreign Reference	PRIOR ART	3
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09-28-2001	LET.	Miscellaneous Incoming Letter	PROSECUTION	1
09-24-2001	OATH	Oath or Declaration filed	PROSECUTION	2
09-24-2001	PEFR	Applicant Response to Pre-Exam Formalities Notice	PROSECUTION	3
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08-21-2001	LET.	Miscellaneous Incoming Letter	PROSECUTION	2
07-30-2001	LET.	Miscellaneous Incoming Letter	PROSECUTION	1
07-30-2001	IDS	Information Disclosure Statement (IDS) Filed (SB/08)	PROSECUTION	2
07-30-2001	FOR	Foreign Reference	PRIOR ART	14
07-30-2001	C.AD	Change of Address	PROSECUTION	1
06-18-2001	PEFN	Pre-Exam Formalities Notice	PROSECUTION	1
04-20-2001	TRNA	Transmittal of New Application	AS FILED	2
04-20-2001	SPEC	Specification	AS FILED	15
04-20-2001	CLM	Claims	AS FILED	2
04-20-2001	ABST	Abstract	AS FILED	1
04-20-2001	IIFW	Issue Information including classification, examiner, name, claim, renumbering, etc.	PROSECUTION	1
04-20-2001	FWCLM	Index of Claims	PROSECUTION	1
04-20-2001	SRFW	Search information including classification, databases and other search related notes	PROSECUTION	1
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